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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Prudential Insurance Company of America,

10 Plaintiff,

11 v.

12 Jerry Lee Wells, et al.,

13 Defendants.
14

No. CV-15-08170-PCT-DGC

ORDER

15 Plaintiff Prudential Insurance Company of America (“Prudential”) filed a motion
16 for default judgment against Defendant Jerry Lee Wells (“Jerry”) or, in the alternative,
17 for appointment of a guardian ad litem to represent Jerry. Doc. 26. Jerry has not
18 responded. The three remaining Defendants – Constance S. Brenton, Lei Ann Stickney,
19 and James Robert Wells – are siblings of Jerry (“Siblings”). The Siblings filed a notice
20 taking no position on Prudential’s motion. Doc. 28. For the following reasons, the Court
21 will deny in part and grant in part Prudential’s motion.

22 **I. Background.**

23 Anita Wells was the mother of Jerry and the Siblings. She was insured by a
24 Prudential group life insurance policy issued to NEA Members Insurance Trust. Doc. 26-
25 2 at 1, ¶ 3. She will be referred to in this order as “the Insured.”

26 The Insured died on January 23, 2015, as a result of blunt force trauma to the
27 head. *Id.* at 2, ¶ 5, 72. Her death was ruled a homicide. *Id.* at 72. The Insured is
28 survived by four children – Jerry and the three Siblings – but no surviving spouse. *Id.* at

1 3, ¶ 11, 72. Jerry has been charged with the Insured's murder, and is currently confined
2 in the Yavapai County Detention Center awaiting prosecution. Docs. 26-1 at 2, ¶ 10; 26-
3 2 at 3, ¶ 9.

4 The Insured's life insurance policy included various term life insurance and
5 accidental death and dismemberment ("AD&D") benefits. Doc. 26-2 at 2, ¶ 4. The
6 Insured's policy included the following benefits which are at issue in this case: (1) NEA
7 New Optional Life Insurance Benefits in the amount of \$5,000; (2) AD&D Upgraded
8 Benefits in the amount of \$99,000 (\$90,000 plus a ten percent additional benefit); and
9 (3) Guaranteed Issue Life Coverage in the amount of \$6,000. *Id.* These benefits became
10 payable on the Insured's death. *Id.* at 2, ¶ 6.

11 Jerry is the designated beneficiary of at least a portion of each of these benefits.
12 The Insured designated all four of her children as beneficiaries, in equal shares, of the
13 NEA New Optional Life Insurance Benefits. *Id.* at 2, ¶ 7, 74. Prudential has paid each of
14 the three Siblings their \$1,250 share of the NEA New Optional Life Insurance Benefits,
15 but has not paid Jerry his \$1,250 share. *Id.* at 3-4, ¶¶ 13-14. The Insured designated
16 Jerry as the sole beneficiary of the \$99,000 of AD&D Upgraded Benefits and the \$6,000
17 of Guaranteed Issue Life Coverage benefits. *Id.* at 2-3, ¶ 8, 77, 81. Prudential has not
18 paid Jerry either of these benefits. *Id.* at 3-4, ¶ 14. In total, Prudential has withheld the
19 \$106,250 of benefits that, but for the pending murder charges, would be owed to Jerry
20 ("Death Benefits"). *Id.* Prudential claims no title or interest in the Death Benefits. *Id.* at
21 4, ¶ 15. Should Jerry be disqualified from receiving the Death Benefits, the \$106,250 in
22 Death Benefits would pass to the Siblings in equal shares. *Id.* at 3, ¶¶ 10, 12; *see also id.*
23 at 18, 49, 69.

24 **II. Analysis.**

25 Prudential argues that it is entitled to a default judgment against Jerry because he
26 has failed to file an answer. Alternatively, Prudential argues that the Court should
27 appoint a guardian ad litem to represent Jerry in this action. Prudential also seeks an
28 order directing it to deposit the \$106,250 in Death Benefits with the Court and

1 discharging it from further liability.

2 **A. Default Judgment.**

3 “A defendant must serve an answer within 21 days after being served with the
4 summons and complaint.” Fed. R. Civ. P. 12(a)(1)(A)(i). If the defendant fails to
5 answer, the plaintiff may request that the clerk of the court enter the defendant’s default.
6 Fed. R. Civ. P. 55(a). A party pursuing a default judgment must first seek the entry of
7 default under Rule 55(a). *See Brooks v. United States*, 29 F. Supp. 2d 613, 618 (N.D.
8 Cal. 1998); *see also* 10A Charles Alan Wright & Arthur Miller, *Federal Practice and*
9 *Procedure* § 2682 (3d ed. 2015). “The power to grant or deny relief upon an application
10 for default judgment is within this Court’s discretion.” *Discovery Commc’ns, Inc. v.*
11 *Animal Planet, Inc.*, 172 F. Supp. 2d 1282, 1287 (C.D. Cal. 2001).

12 Prudential filed its interpleader complaint on September 9, 2015 (Doc. 1), and
13 served it on Jerry on September 18, 2015 (Doc. 9). Prudential submitted its Rule 55(a)
14 application for entry of Jerry’s default on November 24, 2015, well beyond the 21-day
15 period in which Jerry could respond to the complaint. Doc. 13. The Clerk of the Court
16 entered Jerry’s default on November 24, 2015. Doc. 14. Because Prudential is not
17 seeking from Jerry a sum certain or a sum that can be made certain by computation, it
18 must apply for the entry of default judgment from this Court. Fed. R. Civ. P. 55(b).
19 Prudential has done so. *See* Doc. 26 at 6-8.

20 Prudential is not entitled to a default judgment against Jerry at this time. Under
21 Rule 55(b)(2), a default judgment may be entered against an “incompetent person *only if*
22 represented by a general guardian, conservator, or other like fiduciary who has
23 appeared.” Fed. R. Civ. P. 55(b)(2) (emphasis added). There is unrefuted evidence in the
24 record that the Yavapai County Superior Court found Jerry incompetent prior to
25 September 9, 2015, the date on which Prudential initiated this lawsuit. Doc. 26-1 at 5
26 (finding Jerry incompetent as of July 13, 2015); *see also id.* at 2, ¶ 11. Although the
27 Superior Court found that Jerry could likely be restored to competency by October 2016
28 (*id.* at 5), there is no evidence that Jerry has, in fact, been restored. The only evidence

1 available to the Court at this time indicates that Jerry is currently incompetent, and that he
 2 has been so for the duration of this lawsuit. In such a case, default judgment can be
 3 entered against Jerry only if: (1) he has been represented by a general guardian,
 4 conservator, or like fiduciary (2) who has appeared on his behalf. Fed. R. Civ. P.
 5 55(b)(2). Neither has occurred here.

6 It is of no import, as Prudential suggests, that Jerry has not been adjudicated
 7 permanently incompetent. *See* Doc. 26 at 7. The only evidence before the Court
 8 indicates that Jerry is likely incompetent. The Court therefore exercises its discretion to
 9 deny Prudential's Rule 55(b)(2) motion for default judgment. *Discovery Commc'ns*, 172
 10 F. Supp. 2d at 1287.¹

11 **B. Guardian Ad Litem.**

12 Prudential alternatively seeks the appointment of a guardian ad litem to represent
 13 Jerry. Doc. 26 at 8. "The court must appoint a guardian ad litem – or issue another
 14 appropriate order – to protect a minor or incompetent person who is unrepresented in an
 15 action." Fed. R. Civ. P. 17(c)(2). In deciding whether to appoint a guardian ad litem,
 16 courts should consider whether the litigant's claims have merit and, therefore, whether he
 17 has interests that require protection. *See Armstrong v. Mitchell*, No. 13-CV-01421-PHX-
 18 DGC, 2014 WL 460984, at *3 (D. Ariz. Feb. 5, 2014) (citations omitted) (declining to
 19 appoint guardian ad litem to represent incompetent plaintiff where he "has failed to state
 20 a claim and cannot do so").

21 The evidence presented to the Court indicates that Jerry is entitled to the Death
 22 Benefits unless he is convicted of the murder of the Insured or the Court finds by a
 23 preponderance of the evidence that he "would be found criminally accountable for the
 24 felonious and intentional killing of" the Insured. *See* A.R.S. § 14-2803(F). Jerry has not
 25 been convicted, and the Court has not been presented with evidence from which it can

26
 27 ¹ Prudential also argues that the seven factors laid out in *Eitel v. McCool*, 782 F.2d
 28 1470, 1471-72 (9th Cir. 1986), weigh in favor of entering a default judgment against
 Jerry. Because the Court finds Jerry's incompetence and Rule 55(b)(2) dispositive, it
 declines to consider the *Eitel* factors.

1 determine whether Jerry is culpable in the Insured's murder. The Court therefore cannot
2 find that Jerry lacks a legitimate interest in the Death Benefits, and concludes that his
3 interests should be protected through the appointment of a guardian ad litem. Fed. R.
4 Civ. P. 17(c)(2).

5 The Siblings have located an experienced attorney, Paul J. Theut, who is willing
6 and able to serve as Jerry's guardian ad litem. *See* Doc. 28-1 at 2. Although the interests
7 of Jerry and the Siblings are at odds in this matter, the Court is not troubled by the role
8 the Siblings played in suggesting Mr. Theut to represent Jerry. The Siblings took no
9 position on Prudential's motion. *Id.* Through a letter from their counsel, the Siblings
10 stated that they simply "wish the best for their brother." *Id.* The Court also notes that the
11 guardian ad litem would have independent ethical obligations to Jerry. Finally, the Court
12 independently sought input from judges in state court who have dealt with Mr. Theut and
13 received confirmation that he would be an able guardian. The Court is satisfied that Mr.
14 Theut will competently and fairly represent Jerry's interests.

15 Prudential requests that the guardian ad litem's costs and fees be paid out of the
16 Death Benefits. Doc. 26 at 8. The Court agrees, to the extent those costs and fees are
17 reasonable.

18 **C. Depositing the Death Benefits With the Court.**

19 Prudential seeks an order permitting it to deposit the Death Benefits with the Court
20 for the pendency of this lawsuit. Doc. 26 at 8-9. When a party seeks the disposition of a
21 sum of money, "a party – on notice to every other party and by leave of court – may
22 deposit with the court all or part of the money or thing, whether or not that party claims
23 any of it." Fed. R. Civ. P. 67(a); *see also* LRCiv 67.1. "The depositing party must
24 deliver to the clerk a copy of the order permitting deposit." Fed. R. Civ. P. 67(a). In this
25 case, Prudential seeks only to disburse the \$106,250 in Death Benefits to the rightful
26 beneficiary. Prudential has provided notice to both Jerry and the Siblings, each of whom
27 have a colorable claim to the Death Benefits. *See* Doc. 26 at 14 (certificate of service).
28 Moreover, Prudential claims no title or interest in the Death Benefits and stands ready to

1 deposit the funds with the Court. Doc. 26-2 at 4, ¶ 15. The Court concludes that, under
 2 Rule 67(a), Prudential should deposit the \$106,250 in Death Benefits with the Court for
 3 the pendency of this case.

4 **D. Prudential's Discharge From Further Liability.**

5 Prudential argues that it is a disinterested stakeholder and should be discharged
 6 from further liability. Doc. 26 at 9-12. "Persons with claims that may expose a plaintiff
 7 to double or multiple liability may be joined as defendants and required to interplead."
 8 Fed. R. Civ. P. 22(a)(1).² "Interpleader allows a party 'subjected to conflicting claims by
 9 two or more persons growing out of a single obligation' to 'put the money or other
 10 property in dispute into court, withdraw from the proceeding, and leave the claimants to
 11 litigate between themselves the ownership of the fund in court." *Trustees of ILWU-PMA*
 12 *Pension Plan v. Coates*, No. C-11-3998-EMC, 2013 WL 556800, at *2 n.2 (N.D. Cal.
 13 Feb. 12, 2013) (quoting Zechariah Chafee, Jr., *The Federal Interpleader Act of 1936*, 45
 14 Yale L.J. 963, 963 (1936)). "Interpleader's primary purpose is not to compensate, but
 15 rather to protect stakeholders from multiple liability as well as from the expense of
 16 multiple litigation." *Aetna Life Ins. Co. v. Bayona*, 223 F.3d 1030, 1034 (9th Cir. 2000)
 17 (citation omitted).

18 Prudential has an obligation to disburse the Death Benefits to the proper
 19 beneficiary. The Insured designated Jerry as the beneficiary of the Death Benefits at
 20 issue. *See* Doc. 26-2 at 2-3, ¶¶ 7-8; *see also id.* at 74, 77, 81. Prudential has not yet paid
 21 Jerry the Death Benefits due to the pending murder charges. *Id.* at 3-4, ¶ 14. In the event
 22 that Jerry is disqualified from receiving the Death Benefits, the Siblings will be entitled
 23

24 ² Rule 22 does not confer subject matter jurisdiction on federal courts. *See*
 25 *Gelfgren v. Republic Nat'l Life Ins. Co.*, 680 F.2d 79, 81 (9th Cir. 1982). Prudential
 26 asserts, and the Court agrees, that subject matter jurisdiction in this case may be based on
 27 diversity of citizenship under 28 U.S.C. § 1332. There is no doubt that the amount in
 28 controversy is satisfied – the unpaid Death Benefits total \$106,250. In addition, there is
 diversity of citizenship. In a Rule 22 action, there must be diversity of citizenship
 between the stakeholder and each of the claimants. *Gelfgren*, 680 F.2d at 81 n.1.
 Prudential is organized under the laws of New Jersey. Doc. 1 at 1, ¶ 1. Prudential's
 principal place of business is New Jersey. *Id.* Jerry and the Siblings are residents of
 Arizona. Docs. 1 at 2, ¶¶ 2-5; 22 at 1-2, ¶¶ 2, 4-6.

1 to them. *Id.* at 3, ¶¶ 10, 12. The interests of Jerry and the Siblings are therefore adverse.
 2 At this point, Prudential has no way of determining whether Jerry or the Siblings are the
 3 proper beneficiaries; the Court must make that determination. *See* A.R.S. § 14-2803(F).
 4 Prudential therefore is exposed to multiple liability from Jerry and the Siblings, and an
 5 interpleader action is appropriate. *See Primerica Life Ins. v. Arnhold*, No. 3:06-CV-
 6 05210-RBL, 2006 WL 1727972, at *2 (W.D. Wash. June 20, 2006) (citations omitted)
 7 (“Other jurisdictions have held that an interpleader action is appropriate where the
 8 insurance company was specifically notified by criminal authorities that the primary
 9 beneficiary is a suspect in an ongoing investigation of [the] insured’s death.”).

10 In an interpleader action, a district court has discretion to “discharge the plaintiff
 11 from further liability.” 28 U.S.C. § 2361; *see also Allianz Life Ins. v. Agorio*, 852 F.
 12 Supp. 2d 1163, 1168 (N.D. Cal. 2012) (citing 28 U.S.C. § 2361) (finding discharge
 13 proper where plaintiff “is a disinterested party that has deposited the full amount of the
 14 sought-after funds with the court”). The Court declines to discharge Prudential from
 15 liability at this point; Prudential has not yet deposited the Death Benefits with the Clerk
 16 of the Court. Prudential may renew its request for discharge without further liability at
 17 the Rule 16 case management conference.

18 **E. Prudential’s Right to Seek Reimbursement of Fees and Expenses.**

19 Prudential “respectfully reserves its right to make an application to this Court,
 20 within 14 days of adjudication of the within Motion, requesting reimbursement of costs
 21 expended and reasonable attorneys’ fees incurred in connection with establishing this
 22 fund.” Doc. 26 at 12. Prudential has not waived this right. Prudential may file a fee
 23 application within 14 days of its discharge.

24 **IT IS ORDERED:**

25 1. Plaintiff’s motion for default judgment, or in the alternative, for
 26 appointment of a guardian ad litem (Doc. 26), is **granted in part and denied in part**.

27 2. Paul J. Theut of Theut, Theut & Theut PC is appointed as guardian ad litem
 28 for Defendant Jerry Lee Wells in this matter.

1 3. Reasonable fees and expenses incurred by the guardian ad litem in
2 connection with this matter shall be paid out of the Death Benefits to be deposited with
3 the Court pursuant to paragraph 4 of this Order.

4 4. Within 21 days of Prudential's receipt of this order, Prudential shall deposit
5 with the Clerk of this Court the Death Benefits, totaling \$106,250, together with
6 applicable interest, if any.

7 5. The Clerk shall deposit the Death Benefits into the Registry of this Court,
8 in an interest-bearing account.

9 6. The Death Benefits shall remain on deposit until further order of this Court.

10 7. The Clerk shall deduct a fee for handling of the funds, as authorized by the
11 Judicial Conference of the United States and as set by the Director of the Administrative
12 Office, at or equal to 10 percent of the income earned on the investment so held and
13 without further order of the Court.

14 8. Prudential will not be discharged from further liability upon the deposit of
15 the Death Benefits, but may renew its request for discharge at the Rule 16 case
16 management conference.

17 9. Counsel for Prudential shall serve a copy of this order on Mr. Theut within
18 7 days of its receipt. Mr. Theut shall file a notice of appearance within 7 days of
19 receiving this order.

20 10. The Rule 16 case management conference currently set for
21 **February 19, 2016 at 4:00 p.m.** (Doc. 24) is **vacated** and reset for **April 7, 2016, at**
22 **4:30 p.m.** The parties, including Jerry through his guardian ad litem, shall file an
23 amended Rule 26(f) report seven days before the Rule 16 conference. Jerry and the
24 Siblings should address the means by which they intend to resolve this interpleader action
25 after Prudential is permitted to withdraw.

26 Dated this 19th day of February, 2016.

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David G. Campbell
United States District Judge